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In the Supreme Court of the United States

..... Term, 1955.

No. 776.

PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

HAROLD B. WACKERLE and EVELYN WACKERLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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In the Supreme Court of the United States

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PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

HAROLD B. WACKERLE and EVELYN WACKERLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Opinion Below.

Petitioner seeks this Court's writ of certiorari to review a decision of the Court of Appeals for the Eighth Circuit, cited in the official reports as Harold B. Wackerle and Evelyn Wackerle, Appellants v. Pacific Employers Insurance Company, a corporation, 219 F. 2d 1. The opinion and judgment of the Court of Appeals is reprinted in full as Appendix I, post. The Finding of Facts and Conclusion of Law of the trial court are reprinted as Appendix II, post, for the convenience of the Court.

Grounds for Jurisdiction.

The judgment of the Court of Appeals was entered on January 31, 1955. Rehearing and request for consideration by the Court *en banc* was denied March 8, 1955. This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28, U. S. C. A., Sec. 1254).

The certified transcript of record has been filed, the docketing fee has been paid and this petition is filed within the time prescribed by law.

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SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

This is an action for declaratory judgment by the petitioner, Pacific Employers Insurance Company under the provisions of U. S. C. A., Title 28, Chapter 151, Section 2201, for an adjudication of the validity of a policy of liability insurance, and the endorsements thereon. The basis of federal court jurisdiction is diversity of citizenship, the Pacific Employers Insurance Company being a citizen of the State of California, and all of the defendants being citizens of the State of Missouri.

The facts were not particularly in dispute and the issues before the trial court were the determination of the liability of Pacific Employers Insurance Company to defend a suit then pending against an insured of the company, or to pay any judgment rendered in that suit. Primarily, the question presented was the validity of a "Driver Exclusion Endorsement" placed upon the policy.

On November 15, 1952, petitioner through its agent issued its standard form of automobile Liability and Physical Damage Policy to Muriel Wymer for a period of one year, covering a 1951 Mercury automobile owned by the insured. The coverages afforded were bodily injury and property damage liability, medical payments, comprehensive and collision. The policy was a standard form policy approved by the Superintendent of Insurance of Missouri, and the policy was issued at Class 1 rate, which is applicable where "there is no operator of the automobile under 25 years of age resident in" assured's house. At the time the policy was issued the agent explained to Mrs. Wymer that the reason Class 1 rate was used was because her son, Donald, age 23, was away at school and was driving the Oldsmobile owned by the insured.

The Casualty and Security Rate Regulatory Law, Sec. 379.420-379.510, R. S. Mo., 1949, provides for uniformity and regulation of rates in casualty insurance among companies operating in Missouri and provides for regulation by the Superintendent of Insurance of the State. Class 1 rate on file with the Superintendent of Insurance, and approved by him, was $42.16 for the liability coverage furnished the insured. Class 2 rate, where there is an operator under 25 years of age, for the same liability coverage was $69.08.

On January 9, 1953, Donald Wymer, the son of Muriel Wymer, who was attending school and living away from home, was involved in a collision while driving an Oldsmobile belonging to the insured. Thereafter he began living at home and driving the 1951 Mercury. This came to the attention of the agent, and the insured, Mrs. Wymer, was asked to sign a "Driver Exclusion" endorsement excluding Donald Wymer, or to pay increased rate for Class 2. The insured was also told that if she did not sign the endorsement the company might cancel the policy because of her son's prior accidents. The "Driver Exclusion" endorsement is as follows: "In consideration of the premium charged, it is hereby understood and agreed that the undermentioned policy excludes coverage while the automobile covered by the policy is being driven by Donald Wymer." The insured signed and accepted this endorsement and it was delivered to her to be placed on the policy.

On May 22, 1953, Mrs. Wymer sold the 1951 Mercury and purchased a new 1953 Mercury automobile. At the request of Mrs. Wymer an "Automobile Substitution Endorsement" was issued, effective May 22, 1953. This endorsement discontinued coverage on the 1951 Mercury automobile and afforded coverage on the 1953 Mercury

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automobile. The total additional premiums were $77.18 and the return premium was $70.83, thereby requiring the payment by Mrs. Wymer of an additional premium of $6.35. At this time the "Driver Exclusion" Endorsement was part of the policy.

On October 27, 1953, the 1953 Mercury, while being driven by Donald Wymer, was involved in an accident with the respondents. Suit was filed by respondents against Donald Wymer, the driver, and Muriel Wymer, the owner. Judgment was rendered only against Donald Wymer.

The District Court in the instant case entered judgment declaring the rights of the parties to be that plaintiff was not obligated to defend the litigation instituted against Donald Wymer and Muriel Wymer, nor to pay any judgment entered against Donald Wymer because of the accident.

The Eighth Circuit Court of Appeals reversed the judgment, Judge Sanborn dissenting, and remanded with directions to enter judgment for the Wackerles on their counterclaim.

STATEMENT OF THE QUESTION PRESENTED.

DID THE COURT OF APPEALS ERR IN HOLDING THAT UNDER THE FACTS STATED THE DRIVER' EXCLUSION ENDORSEMENT WAS VOID FOR WANT OF CONSIDERATION, AND THAT THE DISCONTINUANCE OF COVERAGE ON THE 1951 AUTOMOBILE AND THE AFFORDING OF COVERAGE ON THE 1953 AUTOMOBILE WAS NOT IN LEGAL EFFECT A NEW CONTRACT BETWEEN THE PARTIES THERETO, THEREBY FAILING TO FOLLOW THE MISSOURI LAW?

Reasons for Granting the Writ.

This case is of extreme importance to all insurance companies writing casualty insurance in Missouri. The Eighth Circuit Court of Appeals has held that these companies cannot legally alter the coverage of their policies without writing a new policy and without taking more premium or returning some premium as the consideration therefor. This materially affects the manner in which these insurance companies may expeditiously handle the very important function of underwriting particular types of risks which arise daily.

This is not an instance of one insurance company placing an unusual type of rider or endorsement on a policy of insurance in an unusual or isolated instance. Riders or endorsements such as were used here are used by thousands of insurance agents daily, where the standard printed form contract does not cover the needs or desires of the parties, and where the parties desire, by mutual assent, to alter the contract so as to conform to their desires. If changes of coverage cannot be made in casualty

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insurance policies by rider or endorsement, then it will be necessary for all casualty insurance companies to completely change their method of operation in underwriting casualty risks.

This decision is wrong. It is contrary to logical and common-sense everyday business practice. It is not the law of Missouri, because it flouts the plain intent of the contracting parties. Because of the importance of the decision and its impact on insurance practice in Missouri, and because it is not the law of this state, this Court should grant certiorari.

I.

The Eighth Circuit Court of Appeals failed to follow the Missouri law in this case.

The State law of Missouri is the controlling rule of decision in this case as to the substantive rights of the parties. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 U. S. C. A. following Sec. 723 c. "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision." *Meredith* v. *Winter Haven,* 320 U. S. 228, 64 S. Ct. 7; *Huddleston* v. *Dwyer,* 322 U. S. 232, 64 S. Ct. 1015.

The Eighth Circuit Court of Appeals has ruled that there was no consideration for the "Driver Exclusion" endorsement placed on this policy. The only Missouri court decision cited as authority for that ruling is the case of *Rice* v. *Provident Life & Acc. Ins. Co.,* 231 Mo. App. 560, 102 S. W. 2d 147 (Kansas City Court of Appeals). This is not a decision of the Supreme Court of Missouri and is not the controlling law of the state on this question. The Rice case involved a health and acci-

dent policy which was issued for a term of one month and was, by its terms, renewable each month upon the payment of a renewal premium. The insured had an attack of rheumatism and an exclusion rider was placed on the policy excluding all liability for disability caused by rheumatism thereafter. There was no classification of persons, nor statement of diseases covered or excluded upon which the premium rate for the policy was based. There was no regulation of the premiums charged by the Superintendent of Insurance. Under this practice the company could have (and apparently would have) reduced the coverage after each successive bout of disability. The Kansas City Court of Appeals held the exclusion endorsement was without consideration. We believe that case was correctly ruled under the circumstances, but it is not the law of Missouri in so far as the question of consideration for an endorsement is presented in the instant case.

Here the insurance contract in question is one of indemnity for liability, wherein the premium charged is based upon certain risks assumed and certain exclusions. The rates are regulated and prescribed by the Superintendent of Insurance of Missouri under the provisions of "The Casualty and Surety Rate Regulatory Law," Secs. 379.420-379.510, R. S. Mo., 1949. The premium paid for the original policy was based upon Class 1 rate, which is applicable only where there is no driver in the household under 25 years of age. The difference in rate between Class 1 and Class 2 for the coverage afforded by this policy is $26.92. When the insured's son began driving the insured automobile, she was faced with having to pay the higher premium for her insurance. This she did not desire to do. This is not an instance of the company attempting to take away or limit the risks insured against

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originally. It was an instance where the insured desired to change the coverage originally bargained for. The insured here voluntarily chose not to pay for the additional risk that would be incurred upon the instance of her son, under 25 years of age, driving the vehicle.

All of these facts were before the trial judge. He is a Missouri lawyer and is familiar with the local laws, statutes and practices. He correctly ruled that there was consideration for the "Driver Exclusion" endorsement.

The Missouri courts have followed the general rule of the law that, "An agreement changed by the mutual assent of the parties becomes a new agreement consisting of new terms and as much of the old agreement as the parties have agreed shall remain unchanged." 17 C. J. S., Sec. 379, page 868. The rule has been followed by a Missouri court in *Denton* v. *Mitchell,* 262 S. W. 2d 639 (Springfield Ct. of App., 1953).

Gibbs v. *Knights of Pythias of Missouri,* 156 S. W. 11, 173 Mo. App. 34 (St. Louis Ct. of App., 1913), was a suit on a certificate of life insurance. The question presented was the right of a personal representative of the insured who was not included within the class of beneficiaries authorized by statute to recover, when it appeared that the insured had fully performed and the contract was fully executed except the payment of the money. The contract as originally written authorized the payment of the insurance to the personal representative of the insured, but thereafter the policy came within the statute of the state (fraternal insurance statute). The court held that the contract was therefore necessarily modified with respect to the right of the insured to designate the beneficiary, and it must comply with the statute. The court held the payment could be made only to those designated

by the statute who could receive it. The court stated, l. c. 13:

> "That a contract as originally made may be subsequently modified as to material terms by the parties to it, and that thereafter the rights flowing from it are to be determined and enforced in accordance with the modified contract, is not open to question. See *Lanitz* v. *King*, 93 Mo. 513, 6 S. W. 263."

In *Avellone* v. *John Weisert Tobacco Co.*, 213 S. W. 2d 222 (St. Louis Ct. of App. 1948), the suit was by a certified public accountant for services rendered to defendant in the investigation of defendant's records and in the preparation of a claim for a refund of processing taxes paid the federal government. The contract as originally written was on a contingent basis, depending on the amount recovered on the claim. However, there was a new arrangement entered into by the parties whereby the defendant agreed to pay plaintiff when he should complete his work and present his bill. Judgment for plaintiff was affirmed. The defendants denied the amendment or second contract and contended it was not supported by consideration. The court stated, l. c. 230:

> "In determining the meaning of a contract, especially where there is a want of clearness in the language used, it is always permissible for the court to consider the situation of the parties and the accompanying circumstances at the time of the execution of contract. 17 *C. J. S. Contracts*, Sec. 321; *Restatement of the Law of Contracts*, Sec. 235; *St. Louis Union Trust Co.* v. *McGovern & Co.*, 297 Mo. 527, 249 S. W. 68; *North St. Louis Building & Loan Association* v. *Obert*, 169 Mo. 507, 69 S. W. 1044; *Velvet Freeze, Inc.*, v. *Milk Wagon Drivers*, etc., Mo. App., 177 S. W. 2d 644."
>
> "Appellant further contends that there was no consideration for the new contract, and that, therefore,

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> plaintiff was not entitled to recover. There is no merit to this contention. The contract had not been fully performed by plaintiff at the time of the new agreement. It has been held that the substitution of a new contract for an old contract while still unperformed is a sufficient consideration for the new contract. *State ex rel. Presnell* v. *Cox et al.,* Mo. Sup., 250 S. W. 374; 17 *C. J. S., Contracts,* Sec. 376, p. 861; *Carman* v. *Harrah,* 182 Mo. App. 365, 170 S. W. 388; *Welch* v. *Mischke,* 154 Mo. App. 728, 136 S. W. 36; *Cannon-Weiner Elevator Co.* v. *Boswell,* 117 Mo. App. 473, 93 S. W. 355; *Davis* v. *Culmer,* 221 Mo. App. 1037, 295 S. W. 803; *Latham* v. *Douglass,* Mo. App., 206 S. W. 392."

In *Graves* v. *Merchants & Mechanics Mut. Fire Ins. Co.,* 139 S. W. 2d 1039 (St. Louis Ct. of App., 1940), it was held that where plaintiff entered into a written contract with an insurance company to investigate the origin of a fire, and thereafter while plaintiff was carrying on the investigation, the parties mutually agreed that in consideration of plaintiff continuing his investigation the defendant would allow additional time beyond that specified was a sufficient consideration for defendant's agreement to extend the time of performance. The contract was still unperformed at the time the verbal agreement was made.

In *Aetna Life Ins. Co.* v. *Meyn,* 134 F. 2d 246 (C. C. A. 8th, 1943), the court interpreted the effect of the conversion of a term policy for a modified life policy. The questions presented were the effective date of the new contract and the automatic loan provision. The court held that the new policy became effective September 5, 1934. The court stated:

> "The agreement of the parties respecting the date of the new policy was not without consideration.

> The insured's age changed on September 6, 1934. The insurance company placed in effect on January 1, 1935, a new manual of insurance rates. Both events caused an increase in the premium payable by Meyn on the policy in suit. He saved this increase by predating the policy, a sufficient consideration for such a contract under the Missouri cases cited." (l. c. 250)

There was a question raised whether the automatic loan provision was placed on the policy with the insured's knowledge and consent. The court stated, l. c. 251:

> "We think it clear, under controlling Missouri decisions, that even though the automatic premium loan provision had been included in the policy without the consent of the insured, nevertheless, his long retention of the policy and continued payment of premiums without objection, coupled with his acquiescence in the application of the provision in question upon his default in the payment of premiums, must be held to constitute its acceptance by him. *Givens* v. *Aetna Life Ins. Co.*, Mo. App., 59 S. W. 2d 761, 763; *Neuner* v. *Gove*, Mo. App., 133 S. W. 2d 689, 694; *Raker* v. *Service Life Ins. Co.*, 226 Mo. App. 1233, 1237, 49 S. W. 2d 285, 287; *Cleaver* v. *Central States Life Ins. Co.*, 346 Mo. 548, 559, 561, 142 S. W. 2d 474, 480, 481; *Lacy* v. *American Central Life Ins. Co.*, 232 Mo. App. 1132, 115 S. W. 2d 193, 129 A. L. R. 1094; *Christensen* v. *New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6; *Lee* v. *Missouri State Life Ins. Co.*, 303 Mo. 492, 503, 261 S. W. 83, 86."

In *State ex rel. N. W. National Ins. Co.* v. *Trimble*, 18 S. W. 2d 21, 322 Mo. 1236 (1929), the Supreme Court upheld a ruling of the Kansas City Court of Appeals that a vacancy permit attached to a fire policy was valid.

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The policy as originally written provided, "If the premises are vacant for a period exceeding sixty days or unoccupied for a period exceeding six months at any one time this policy is void, unless special form of permission therefore is attached thereto." After the premises became vacant the following endorsement was issued:

> "Permission is hereby granted for the premises described in this policy to remain vacant from the 28th day of February, 1925 to the 28th day of April, 1925 * * * In consideration of the increased hazard by reason of such vacancy or unoccupancy, during such vacancy, one-third of the amount of insurance under each item of this policy shall be and remain suspended and of no effect. * * *"

The court held that the acceptance by insured of reduced insurance coverage was the consideration for the new contract allowing the vacancy.

It can be seen that what constitutes adequate consideration for modification of a written contract depends upon several factors. In analyzing and applying the decisions of the courts it is necessary to look behind the language and analyze the situation as it existed between the parties at the time the modification was made.

There are many types of insurance contracts which have been construed and it is necessary to keep in mind the different theories of insurance contracts, the different manner of determining risks, rates, and coverages, and the basis or reason for the modification of the original contract. It is therefore necessary to distinguish the essential differences in the policies and in the positions of the parties to the contract before applying the rules gleaned from decisions interpreting them. As stated by

the Supreme Court of Missouri in *Morse* v. *Consolidated Underwriters,* 163 S. W. 2d 586, 587, 349 Mo. 785 (1942):

> "In applying cases which have been decided, what may have been said in the opinion should be confined to, and limited by, the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different."

As stated in *Sulzbacher* v. *Travelers Ins. Co.,* 137 F. 2d 386, 392 (C. C. A. 8th, 1943):

> "In the nature of things, cases construing a particular contract cannot have controlling force in a case involving another and different contract."

In construing the facts in this case in relation to the cases decided, it should be kept in mind that this is an automobile liability policy, wherein the premium is based upon certain risks assumed and certain exclusions; that the rates charged are determined by the purposes for which the automobile is to be used, the persons driving the automobile, the locality where the automobile is generally used, etc., which factors increase or decrease the hazards insured against in automobile liability insurance.

II.

The decision is in conflict with the rule pronounced in prior decisions of the Circuit Court of Appeals for the Eighth Circuit.

In the case of *Magill* v. *Travelers Ins. Co.,* 133 F. 2d 709, 713 (C. C. A. 8th, 1943), Judge Sanborn stated:

> "In deciding what the highest court of a state would probably hold the state law to be, great weight

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> may properly be accorded by this court to the view of the trial court."

Other cases where this same court has announced the rule are: *Doering* v. *Buechler,* 8 Cir., 146 F. 2d 784, 788; *Railway Mail Ass'n* v. *Chamberlin,* 8 Cir., 148 F. 2d 206, 208; *Globe Indemnity Co.* v. *Walcott & Lincoln,* 8 Cir., 152 F. 2d 545, 547; *Western Casualty & Surety Co.* v. *Coleman,* 8 Cir., 186 F. 2d 40, 43; *Buder* v. *Becker,* 8 Cir., 185 F. 2d 311, 315; *Pacific Employers Ins. Co.* v. *Nance,* 8 Cir., 212 F. 2d 4.

The Eighth Circuit Court of Appeals has, in conflict with the rule announced, totally disregarded the conclusions of law of the trial judge, in a matter of interpretation of the local law of Missouri.

The decision of the trial court was not induced by a "clear misconception or misapplication of the law" and it should have been affirmed. Judge Sanborn, in the case of *Russell* v. *Turner,* C. C. A. 8th, 148 F. 2d 562, 564, stated:

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error. * * *. All that this court reasonably can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the law."

The precise question presented in this case has never been determined by the Supreme Court of Missouri so that we can only presume what that Court would likely hold under the facts presented. Judge Ridge ruled that the discontinuance of insurance coverage as to the 1951 Mercury

automobile, and the affording of insurance with respect to the 1953 Mercury by the "Automobile Substitution Endorsement" was in legal effect the substitution of a new contract for an old one existing between the parties; that the payment of additional premium for the new contract was sufficient consideration to sustain the "driver exclusion" endorsement. This is a reasonable, sound, and logical conclusion. It is not based upon any misconception or misapplication of the Missouri law.

The Eighth Circuit Court of Appeals should, therefore, have affirmed the decision of the trial court.

III.

This case is of sufficient importance in the commercial field of liability insurance contract law to elicit certiorari.

As we have stated heretofore, the writing of automobile casualty insurance in the State of Missouri will be vitally affected by this decision. The decision is contrary to the general rule of law with respect to the rights of parties to contract, or by mutual assent to change that contract. The decision is contrary to the rationale of the law of Missouri as stated in the cases. Specifically the important question presented to all liability insurance companies operating in Missouri is whether or not, as a result of this opinion, they may safely change any items of coverage in a liability insurance contract without going through the unwieldy process of cancelling the existing contract and returning to the insured the return premium, and thereafter issuing a new insurance contract and charging a new premium therefor.

The decision of the Court of Appeals for the Eighth Circuit in this case is so far contrary to the rationale of the law in Missouri, and the common-sense, logical, and

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sound application of that law to a set of facts which is common every-day business practice, as to make the decision in conflict with the whole body of insurance law.

The practical considerations of this decision are so far-reaching in the effect they will have on the insurance industry, that if allowed to stand, the decision will work a hardship, not only on the insurance companies alone, but also upon the vast number of persons who carry policies of liability insurance.

Conclusion.

For the reasons suggested in the petition, we respectfully submit that this case should elicit certiorari and be reversed.

Prayer for Writ of Certiorari.

Wherefore, petitioner prays this Court's writ of certiorari to review and reverse the judgment of the Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

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Appendix I.

(Opinion)

United States Court of Appeals

For the Eighth Citrcuit.

No. 15,146.

HAROLD B. WACKERLE and EVELYN WACKERLY, *Appellants,*

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation, *Appellee.*

Appeal from the United States District Court for the Western District of Missouri.

(January 31, 1955.)

HAROLD B. BAMBURG (Bamburg & Bogutski and Earl T. Crawford were with him on the brief) for Appellants.
HAROLD T. VAN DYKE (Davis, Thomson, Van Dyke & Fairchild were with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal from a declaratory judgment determining that appellee (plaintiff below) was not liable

to the appellants on an automobile liability insurance policy and dismissing appellants' counterclaim. Jurisdiction is based on diversity of citizenship. The decisive issue is the validity of a driver exclusion endorsement.

On November 15, 1952, appellee, for a consideration of $145.16 paid it, delivered to Muriel Wymer its standard automobile liability policy running for one year, with coverage upon insured's 1951 Mercury automobile of $15,000 per person, $30,000 per accident for bodily injury; $5,000, property damage; and further provisions for medical payments, comprehensive and collision insurance. The policy contained an omnibus clause which reads as follows:

> "III *Definition of Insured*
> With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

As to cancellation by the insurer the policy provides:

> "This policy may be cancelled by the company by mailing to the named insured at the address shown in this Policy written notice stating when not less than five days thereafter such cancellation shall be effective."

There is an additional provision that in the event of cancellation pro rata unearned premiums are to be returned to the insured. The policy gives the insurer no right to raise the premium nor does it contain any reference to any rating or classification of risk.

At the time of the issuance of the policy, Donald Wymer, son of Muriel Wymer, the named insured, was operating

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an Oldsmobile owned by the family and insured by appellee through its same local agency. Donald later had an accident which demolished the Oldsmobile, and thereafter he used the Mercury described in the involved policy. On January 26, 1953, appellee's local agent, Mrs. Rosencrans, contacted Mrs. Wymer and requested her to sign a rider reading:

"DRIVER EXCLUSION

"IN CONSIDERATION OF THE PREMIUM CHARGED, IT IS HEREBY UNDERSTOOD AND AGREED THAT THE UNDERMENTIONED POLICY EXCLUDES COVERAGE WHILE THE AUTOMOBILE COVERED BY THE POLICY IS BEING DRIVEN BY DONALD WYMER.

ACCEPTED

"Nothing herein contained shall be held to vary, alter, or extend any of the terms, conditions or limitations of the undermentioned Policy other than as above stated."

The agent explained to Mrs. Wymer that if she did not sign the rider the insurer would have to charge an additional premium because the car would be operated by a driver under 25 years of age, and the agent didn't know whether the company would keep the policy in force if she didn't sign the exclusion agreement. The agent fully explained that if the rider was signed there would be no coverage while the car was operated by Donald. Mrs. Wymer signed the rider. It was approved by the insurer and attached to the policy as an endorsement. There is neither pleading nor proof of fraud or duress in obtaining the rider. No part of the original premium was returned.

About May 22, 1953, the insured traded the Mercury covered by the policy for a 1953 Mercury and reported this

to the insurer's local agent. Thereupon, an endorsement was attached to the policy eliminating coverage of the 1951 Mercury and substituting the 1953 Mercury. Upon the endorsement appears a statement showing the premium on the new car for the balance of the original term of $77.18 and credit on the old car of $70.83, making a difference in premium of $6.35 which Mrs. Wymer paid the insurer. This increase was caused by larger premiums for comprehensive and collision insurance, there being no change in the amount due for personal injury or property damage. This endorsement also contains a provision, "Nothing herein contained shall be held to vary, alter, waive, or extend any of the terms, conditions or limitations of the undermentioned policy other than as above stated."

On October 27, 1953, the insured Mercury, while being operated by Donald Wymer with his mother's consent, was involved in a collision with the Wackerle automobile. By amendment to the Wackerles' answer and counterclaim it is shown that subsequent to the commencement of this action the Wackerles recovered a judgment against Donald Wymer and Muriel Wymer in the Circuit Court of Pettis County, Missouri, for $17,500 and costs, for damages resulting from the collision hereinabove mentioned, and in their counterclaim they ask judgment against appellee for this amount. Muriel Wymer, Donald Wymer, and others were made defendants to this action, but only Harold B. Wackerle and Evelyn Wackerle have appealed, and where the word "appellants" appears in this opinion, same refers to the Wackerles.

Subject to the appellants' objections, evidence was introduced that the policy was issued at Class 1 rate, which rate is applicable when there is no driver in the household under 25. The Class 2 rate which is higher is used when there is a driver in the household under 25. Donald Wymer

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was under 25 years of age. No written application for the policy appears in the record, and there is neither pleading nor proof that the Wymers were guilty of any fraud or misrepresentation in obtaining the policy.

The insurance contract is a Missouri contract. Consequently, it is the duty of this Court to follow the law of Missouri. *Mutual Benefit Health & Accident Ass'n* v. *Cohen,* 8 Cir., 194 F. 2d 232, 239.

The appellants do not question the right of an insurer in its policy to exclude coverage as to a particular driver, and concede this may be accomplished by endorsement issued with the policy at the time it is written. In such cases the premium paid gives the insured the coverage he bargained for. In the present case it is undisputed that the policy when issued covered the insured automobile while it was being operated by the son, Donald. The insured had fully performed her part of the insurance contract by paying the stipulated premium. Appellants strenuously contend that, in order to modify the policy as written by adding a driver exclusion clause, it is absolutely essential that such an agreement be supported by a consideration. Such appears to be the law of Missouri. This Court has fully considered this problem in *Mutual Benefit Health & Accident Ass'n* v. *Cohen, supra.* That case involved an insurance policy issued in 1928 which provided for monthly benefits for the duration of disability resulting from disease. On October 30, 1942, the insured and insurer executed a rider reciting that in consideration of the acceptance of renewal of the policy the maximum period of recovery for sickness or accident liability was limited to one year, the rider to become effective on date of next premium payment. Thereafter, insured became ill for over a year. The insurance company paid for only one year's disability, and suit was brought to recover for the balance

of the period of disability, the insured contending that the rider was void as being without consideration. This Court relied upon and fully discussed the case of *Rice* v. *Provident Life & Accident Ins. Co.*, 231 Mo. App. 560, 102 S. W. 2d 147. This Court found that the *Rice* case was not squarely in point on the issue that there was no consideration, as in the *Rice* case the rider was made effective July 20 at a time when the premium had been paid to August 1, whereas in the *Cohen* case the rider was to be effective on the next premium payment date. In the *Cohen* case at pages 240-241 the court says:

> "From the foregoing analysis of the *Rice* opinion we conclude that the Court decided that refraining from increasing the premium for the same coverage in lieu of *cancellation* of the policy was not a legal consideration for the rider reducing the coverage at the same premiums, at a time when the company had a right to cancel the policy, because the policy provided a stated premium for the coverage therein set forth. It was in connection with such holding that the sentence here involved and quoted hereinbefore was used. The effect of that language is that the Court thought the same result would follow where a like rider was executed in connection with a renewal at a premium paying date.
>
> "Although this language applies to the situation now before us, it was an *obiter dictum* when used in the *Rice* case. The issue in the *Rice* case was one of the rights of the company as to cancellation and not as to renewal. This language was not necessary to a determination of the issue of consideration *vel non* under the fact situation there. Indeed, the effect of a renewal of the policy was discussed and determined upon an entirely different ground, to wit, the invalidity of the rider *at the time it was executed and was expressed to be effective,* which was before the renewal date. * * *"

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The *Rice* case is directly in point upon the consideration issue in the case now before us, for here, as in the *Rice* case, the attempt has been made to make the rider effective during a period for which the premium had been fully paid. The appellee argues that the cases on health and accident policies are not in point because of the difference in contracts, that in connection with health and accident contracts there is no classification of risk used as a basis for determining the premium, and that in health and accident cases it is not shown that there is a changing condition which would give rise to a right to raise the premium. None of such reasons assigned affords a valid basis for distinction. Changes of conditions which give rise to additional risks will arise at least as frequently in the health cases. It is obvious that a person who has had rheumatism or arthritis, as involved in the *Rice* case, is far more apt to have future disability than a well person. Most types of insurance policies reserve the right to cancel, and frequently the health policies give the insurer a right to refuse to renew. In any event, consideration is an element of the law of contracts, and applies to all types of contracts including all types of insurance contracts.

In the *Cohen* case, *supra,* the following excerpt from the *Rice* case is quoted:

> "'The rider itself recites that it is subject otherwise to all conditions, agreements, and limitations of the policy as written except as in itself is specifically provided. It is true that those that make a contract may unmake it or substitute another, either wholly or partially inconsistent; *but the validity of the substituted contract must be determined,* like that of any other, *in the light of the situation existing at the hour of its making.* If valid, then it will supersede or modify the first to the extent that the two will be unable to stand together. *Lieberman* v. *Templar*

Motor Co., 236 N. Y. 139, 140 N. E. 222, 29 A.L.R. 1089.

> " 'Applying the rule thus stated, the rider in question was at the time that it was executed void for the reason that no consideration at such time existed therefor; and, being inconsistent with and repugnant to the provisions of the original policy, it cannot stand. The original policy as continued from month to month or as renewed from month to month was unaffected by such rider.' "

Since the policy as originally written provided for coverage when the insured automobile was being driven by Donald Wymer, this valuable right could not be taken away from the insured by mutual consent alone unsupported by consideration. No consideration for the rider has been shown.

The trial court based its decision largely on the following conclusion of law:

> "The 'discontinuance' of insurance coverage as to the 1951 Mercury automobile owned by the insured Muriel Wymer, and the 'afford (ing of) insurance with respect to the (new) automobile described' in the 'Automobile Substitution Endorsement' was in legal effect the substitution of a new contract for an old one existing between the parties. The payment of an additional premium by insured for such new contract, in and of itself, was sufficient consideration to sustain the 'driver exclusion' endorsement attached to the policy of insurance in suit."

Appellee insists that the foregoing conclusion is a correct statement of law, and that the substitution of automobiles by the endorsement was in effect the substitution of a new contract for the old contract. A similar argument was

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urged in the *Rice* and *Cohen* cases. In the *Rice* case, the Missouri court, in rejecting such argument, says (p. 151):

> "It is contended further by the defendant that plaintiff's policy having terminated on August 1, 1932, after the execution of the rider, the plaintiff thereafter renewed it from month to month thereby entering into new contracts with the defendant of which the rider was an integral part, and that, since the policy when renewed was subject to the rider, the rider became part of the renewal contract and furnished a complete bar to plaintiff's action, regardless of the fact that it was not originally based on a valid consideration.
>
> "We cannot agree to such contention. While the renewal of an insurance policy constitutes a separate and distinct contract for the period of time covered by the renewal, it is nevertheless a contract with the same terms and conditions as those contained in the policy which it renewed."

And at a later point, the court says:

> "Applying the rule thus stated the rider in question was at the time it was executed void for the reason that no consideration at such time existed therefor, and being inconsistent with and repugnant to the provisions of the original policy it cannot stand. The original policy as continued from month to month or as renewed from month to month was unaffected by such rider."

The *Cohen* case gathers from the *Rice* case that the Missouri court would apply the reasoning as to forfeiture cases to renewal cases. This Court in the *Cohen* case at page 241 says:

> "* * * It is clear that the facts and the issues covering the rights of cancellation and the rights in connection with renewals of insurance policies are, in

their nature, different. That is true both as to the *Rice* case and as to this case. The circumstances that the Court stated that it would reach the same result and for the same reasons in a renewal situation as it did reach in a cancellation before it does not prevent such expression from being *obiter dictum* as to the renewal matter.

* * * * * * *

"* * * While the *Rice* case is not authoritatively controlling, because of differences in issues and facts, yet the reasoning and language used therein point strongly to the conclusion that had the issue before us been there involved, the result would have been against the company. We do not intimate what our view might be if we were not bound to follow the State law as nearly as we can predict it from the material at hand. We take merely the judicial venture which seems to us as most probably anticipating what the State Courts would determine as to the State law."

By the substitution agreement, hereinabove referred to, the insurer was obligated to substitute the new car for the old car, the insured being required to pay any additional premium required because of the application of the insurance to the new automobile. The evidence shows that the difference of $6.35 paid insurer for the substitution was due to higher premiums for the comprehensive and collision insurance. The comprehensive insurance was to the extent of the actual cash value of the automobile. The basis of the difference is not explained, but without doubt the additional premium was occasioned by the higher value of the new car, and consequently the higher damages that would have to be paid in case of fire, theft, or collision. It seems probable that the computations were based on the same rates that were applied in determining the original premium. In any event, it would appear that this was con-

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templated by the provision as to additional premium in the newly-acquired automobile provision in the policy. We can not see where the payment of this $6.35 by the insured can in any way furnish a consideration for the exclusion rider. We hold that the substitution agreement did not provide a consideration for the exclusion rider.

Appellee likewise contends that since appellants were strangers to the insurance contract and modification thereof they can not raise the question of lack of consideration. The pleadings, if any, of the Wymers are not set out in the record. The court's decree recites that no appearance was made for such defendants. In support of this proposition the appellee cites *Stanfield* v. *McBride*, 149 Kans. 567, 88 P. 2d 1002; and *Employers Mutual Casualty Co.* v. *American Automobile Insurance Co.*, 10 Cir., 131 F. 2d 802. Both of these cases arose out of the same transaction and involve the application of the law of Kansas. They support appellee's contention. The two cases involving the Kansas law are the only ones cited by appellee to support its contention. In this case we are concerned with the law of Missouri. The Missouri statutes provide for direct action by the injured party against the insurer if he has obtained judgment against the insured and same is not paid within thirty days. 1949 Missouri Revised Statutes, section 379.200.[1]

---

[1] §379.200. *Judgment creditor may collect insurance, when*
Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in section 379.195, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

In an action by an injured party against the wrongdoer's insurance company, the injured party stands in the shoes of the insured, and his rights are no greater and no less than the insured's would have been in an action between the insured and the insurer on the policy. *Bauman* v. *Western & Southern Indemnity Co.,* 230 Mo. App. 835, 77 S. W. 2d 496; *Binswanger* v. *Employers Liability Assurance Corp. Ltd.,* 224 Mo. App. 1025, 28 S. W. 2d 448; *General Casualty & Surety Co.* v. *Kierstead,* 8 Cir., 67 F. 2d 523; *Coleman* v. *New Amsterdam Casualty Co.,* 247 N. Y. 271, 160 N. E. 367.

In the *Binswanger* case, *supra,* the injured party sued the insurance company for reformation for mutual mistake as to the insured's name and for damages. Insured was not a party to the suit. The injured party was granted relief. In discussing the issue which now concerns us, the court said:

> "It is claimed that 'neither plaintiff nor his intestate were parties to the contract of insurance, nor do they bear such relationship to it or to Fleeman-McNeill Funeral Home as entitles him to maintain an action for reformation.' In this connection it is argued that 'the rule uniformly applied in determining who are entitled to reformation, limits the remedy to original parties or those in privity with them.'
>
> "It is well settled that a contract may be made for the benefit of a third person and such a contract, when supported by a valid consideration, may be sued upon by such person. The rule is well stated in *Ulrich* v. *Globe Surety Co.,* 191 Mo. App. 111, 114, 166 S. W. 845, 846, as follows:
>
> " 'A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit. *This is so though such third party be not named in the contract, and though he was not privy to the consideration.* It is sufficient on order to create the necessary privity that the

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promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim.'

"In *Lumber Co.* v. *Schwartz,* 163 Mo. App. 659, 665, 147 S. W. 501, 502, it is stated:

" 'A third person for whose benefit a contract is made may enforce the contract in an action prosecuted in his own name and in an action on a common-law bond of the nature of that in suit a materialman for whose benefit the bond was taken may sue as plaintiff.'

"That there was such a privity between the insured and the deceased, to whom the insured owed a duty not to negligently injure, there can be no question.* * *"

It is apparent that under the laws of Missouri the appellants are entitled to raise the issue that the driver exclusion rider was void for want of consideration.

Appellee further argues that the insured, and consequently the appellants, would be estopped from raising the defense of lack of consideration. Estoppel is not pleaded. This issue does not appear to have been raised in any way in the trial court. Estoppel is an affirmative defense which must be pleaded. Rule 8(c), Federal Rules of Civil Procedure. If not pleaded the defense can not be raised on appeal. *Mutual Benefit Health & Accident Ass'n* v. *Cohen, supra,* footnote 2, page 234; *Cummings* v. *Moore,* 10 Cir., 202 F. 2d 145; *Tornello* v. *Deligiannis Brothers, Inc.,* 7 Cir., 180 F. 2d 553.

We reach the conclusion that the driver exclusion rider is void for want of consideration, and that hence the policy issued by the appellee covered the operation of the insured car by Donald Wymer at the time of the accident; and it is further concluded that under Missouri law appellants are entitled to assert the issue that the rider is void for lack of consideration. Since appellants have al-

ready obtained a judgment in the State court, they are entitled to bring suit against the insurer and they have done this in their counterclaim. Appellants are entitled to recover upon their counterclaim to the extent of the coverage provided by the policy. We can not determine from the judgment whether the amount thereof is within the policy limits as the judgment in evidence does not indicate how much of it is for personal injury and to whom, and how much, if any, is for property damage.

The judgment determining that the appellee is not obligated on its policy is reversed, and this case is remanded to the District Court with directions to enter judgment for appellants upon their counterclaim to the extent that such judgment is within the limit of the coverage provided by the policy involved in this action.

SANBORN, Circuit Judge, dissenting.

Judge Ridge, who decided this case, has adequately and accurately stated the essential facts as follows:

> "The only issue between the parties is as to the validity of the 'driver exclusion' endorsement attached to the policy of liability insurance issued to Muriel M. Wymer and covering her 1953 Mercury automobile.
>
> "A policy was issued to insured on November 15, 1952, covering a 1951 Mercury. A 'driver exclusion' endorsement, excluding coverage to Donald Wymer, was attached to that policy on January 26, 1952, with the consent of the insured, after insured had been informed by the insurer's agent, that if her son Donald Wymer had access to, and did drive and operate the Mercury automobile, an additional premium would have to be paid to the plaintiff. Insured, Muriel Wymer, signed and accepted endorsement on January 26, 1952, effective at 12:01 A.M.

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"On May 22, 1953, Mrs. Wymer purchased a new 1953 Mercury. On the same day, in consideration of additional premium of $6.35, an 'automobile substitution endorsement' was attached to the above policy. By said endorsement, the insurance with respect to the 1951 Mercury was 'discontinued,' insured was given credit for $70.83 return premium, and in consideration of $77.18 additional premium, insurance coverage was afforded to her 1953 Mercury, subject to all the terms, conditions and limitations of the policy then existing.

"The 'driver exclusion' endorsement was then a part of said policy.

"A loss payable clause was contained in the automobile substitution endorsement in favor of defendant Jenkins-Greer Motor Company.

"On October 27, 1953, while Donald Wymer was driving the 1953 Mercury, with the consent of his mother, he was involved in a collision with a car driven by Harold B. Wackerle. As a result thereof, Harold B. Wackerle and his wife, Evelyn Wackerle, recovered judgment against Donald Wymer, in the total sum of $17,500.00, in ensuing litigation."

The Judge reached the following conclusions of law:

"The 'discontinuance' of insurance coverage as to the 1951 Mercury automobile owned by the insured Muriel Wymer, and the 'afford(ing of) insurance with respect to the (new) automobile described, in the 'Automobile Substitution Endorsement' was in legal effect the substitution of a new contract for an old one existing between the parties. The payment of an additional premium by insured for such new contract, in and of itself, was sufficient consideration to sustain the 'driver exclusion' endorsement attached to the policy of insurance in suit.

"Under said 'driver exclusion' endorsement, insurance coverage was not afforded if the 1953 Mercury automobile was being driven by Donald Wymer."

I regard Judge Ridge's decision as sound and logical. The appellants have failed to convince me that it is based upon any misconception or misapplication of the law of Missouri.

Unquestionably, the contract to insure the 1953 Mercury did not come into existence until May 22, 1953. The contract was evidenced by the "Automobile Substitution Endorsement" which expressly made the terms and conditions of the policy which had covered the 1951 Mercury applicable to the coverage on the 1953 car. Surely that made the "driver exclusion" endorsement in the contract covering the 1951 car a term or condition of the contract covering the 1953 car.

What the insured and the Company did on May 22, 1953, was, in legal effect, the full equivalent of cancelling the policy on the 1951 car by mutual consent, applying the unearned premium on that policy upon the premium applicable to the new contract on the 1953 car, with terms and conditions identical with those of the policy it superseded, including the endorsement which excluded Donald Wymer from coverage.

But if the contract to insure the 1953 Mercury were to be considered as a mere continuation of the policy on the 1951 Mercury and subject to its infirmities, I would still be of the opinion that the endorsement excluding Donald Wymer from coverage was not without consideration. It is obvious that the insured, at the time she agreed to this endorsement, was faced with doing that or with having to pay a higher premium for her insurance or with having the insurance cancelled by the Company. She voluntarily chose a limitation of the risk insured against. I can see no valid basis for refusing to give effect to what the parties, under the circumstances, agreed to. Nor do I think there is any sound reason why an insured, to save an automobile

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liability policy from cancellation, may not agree with his insurer to exclude an accident-prone member of the insured's family from liability coverage.

In federal cases controlled by state law this Court has consistently relied upon and ordinarily accepted the considered views of the trial judges with respect to doubtful questions arising under the laws of their respective states. Very recently, Judge Johnsen, in *Kasper* v. *Kellar,* 8 Cir., ... F. 2d ....., opinion filed Dec. 16, 1954, said of our rule in that regard:

> "* * * And on the question of resolving what local law is, which is unclear or unsettled, we have particularly emphasized, as our many decisions indicate, that we desire and will heavily rely upon the considered appraisal of a District Judge as to what the local law of his jurisdiction is.
>
> "This is as it should be, for factors of evaluation and judgment on unsettled questions will naturally be present at the local level, which are not available to us, such as unreported trial-court decisions, percolating judicial trends, accepted legal climate, and familiarity with prevailing professional thought and temper."

See also, *Guyer* v. *Elger,* 8 Cir., 216 F. 2d 537.

It seems particularly important to me that this rule should be adhered to in cases involving doubtful questions of insurance law, since so much of it reflects the local practices and customs of insureds, insurers and insurance agents, as well as existing judicial and legal trends and attitudes. About six months ago, in *Pacific Employers Ins. Co.* v. *Nance,* 8 Cir., 212 F. 2d 4, Judge Ridge was affirmed by this Court upon the ground that his decision was based upon a permissible conclusion as to a doubt-

ful question of Missouri insurance law. It can be said in the instant case, as we said in that case:

> "The arguments and briefs of counsel, who are Missouri lawyers, have demonstrated that the question of law presented for review is a doubtful one. It has been decided adversely to the Company by a Missouri federal district judge who was entirely competent to rule upon the question and who has given it careful consideration. Our conclusion is that the District Court has reached a permissible conclusion as to a doubtful question of local law, and that the judgment appealed from should be affirmed."

Other cases in which we have declined to substitute our judgment for that of the trial judge with respect to doubtful questions of local insurance law are: *Magill* v. *Travelers Ins. Co.*, 8 Cir., 133 F. 2d 709, 713; *Doering* v. *Buechler*, 8 Cir., 146 F. 2d 784, 788; *Railway Mail Ass'n* v. *Chamberlain*, 8 Cir., 148 F. 2d 206, 208; *Globe Indemnity Co.* v. *Wolcott & Lincoln, Inc.*, 8 Cir., 152 F. 2d 545, 547; *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F. 2d 40, 43. See also and compare, *Buder* v. *Becker*, 8 Cir., 185 F. 2d 311, 315.

I would affirm the judgment appealed from.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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(Judgment)

UNITED STATES COURT OF APPEALS.

For the Eighth Circuit.

September Term, 1954.
Monday, January 31, 1955.

Harold B. Wackerle and Evelyn Wackerle, Appellants, vs. Pacific Employers Insurance Company, a corporation, Appellee.	No. 15146

Appeal from the United States

District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause determining that the appellee, Pacific Employers Insurance Company, a corporation, is not obligated on its policy, be, and the same is hereby reversed with costs; and that Harold B. Wackerle and Evelyn Wackerle have and recover against the Pacific Employers Insurance Company, a corporation, the sum of one hundred six and 60/100 (106.60) dollars for their costs in this behalf expended, and have execution therefor.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the appellants, Harold B. Wackerle and Evelyn Wackerle, upon their

counterclaim to the extent that such judgment is within the limit of the coverage provided by the policy involved in this section.

January 31, 1955.

Appendix II.

In the United States District Court for the Western District of Missouri, Central Division.

Pacific Employers Insurance Company, a corporation, Plaintiff, vs. Muriel Wymer, Donald Wymer, Evelyn Wackerle, Harold B. Wackerle, and Jenkins-Greer Motor Company, a corporation, Defendants.	No. 493

Finding of Facts.

The only issue between the parties is as to the validity of the "driver exclusion" endorsement attached to the policy of liability insurance issued to Muriel M. Wymer, and covering her 1953 Mercury automobile.

A policy was issued to insured on November 15, 1952, covering a 1951 Mercury. A "driver exclusion" endorsement, excluding coverage to Donald Wymer, was attached to that policy on January 26, 1952, with the consent of the insured, after insured had been informed by the insurer's agent, that if her son, Donald Wymer, had access to, and did drive and operate, the Mercury automobile, an additional insurance premium would have to be paid to the plaintiff. Insured, Muriel Wymer, signed and accepted endorsement on January 26, 1952, effective at 12:01 A.M.

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On May 22, 1953, Mrs. Wymer purchased a new 1953 Mercury. On the same day, in consideration of additional premium of $6.35, an "automobile substitution endorsement" was attached to the above policy. By said endorsement, the insurance with respect to the 1951 Mercury was "discontinued," insured was given credit for $70.83 return premium, and in consideration of $77.18 additional premium, insurance coverage was afforded to her 1953 Mercury, subject to all the terms, conditions and limitations of the policy then existing.

The "driver exclusion" endorsement was then a part of said policy.

A loss payable clause was contained in the automobile substitution endorsement in favor of defendant Jenkins-Greer Motor Company.

On October 27, 1953, while Donald Wymer was driving the 1953 Mercury, with the consent of his mother, he was involved in a collision with a car driven by Harold B. Wackerle. As a result thereof, Harold B. Wackerle and his wife, Evelyn Wackerle, recovered judgment against Donald Wymer, in the total sum of $17,500.00, in ensuing litigation.

Conclusion of Law.

The Court declares the law to be:

The "discontinuance" of insurance coverage as to the 1951 Mercury automobile owned by the insured, Muriel Wymer, and the "afford(ing of) insurance with respect to the (new) automobile described" in the "Automobile Substitution Endorsement" was in legal effect the substitution of a new contract for an old one existing between the parties. The payment of an additional premium by insured for such new contract, in and of itself, was

sufficient consideration to sustain the "driver exclusion" endorsement attached to the policy of insurance in suit.

Under said "driver exclusion" endorsement, insurance coverage was not afforded if the 1953 Mercury automobile was being driven by Donald Wymer.

Plaintiff is entitled to a declaration of rights to the effect that plaintiff is not obligated to defend the litigation instituted against Donald Wymer and Muriel Wymer as a consequence of the litigation above referred to; and is not obligated to pay any judgment entered against Donald Wymer therein. Neither is plaintiff obligated to Muriel Wymer or Jenkins-Greer Motor Company for any collision damage to the 1953 Mercury automobile resulting from a collision occurring while Donald Wymer was driving the 1953 Mercury automobile.

The several counterclaims of the defendants should be, and the same are hereby, dismissed.

/s/ ALBERT A. RIDGE
Judge

Although the parties have not briefed and submitted this action to the Court upon the above issue, it being so obvious from the foregoing that fortifying authority is not necessary to demonstrate that plaintiff is entitled to the relief prayed, the pleadings and briefs of the parties will be considered amended accordingly, as permitted in Rule 15(b), F. R. Civ. P.

Counsel prepared decree accordingly.

/s/ ALBERT A. RIDGE
Judge

Dated at Kansas City, Missouri,
this 16th day of June, 1954.

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No. 776.

IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1955.

PACIFIC EMPLOYERS INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

HAROLD B. WACKERLE and EVELYN WACKERLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

LON HOCKER and
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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No. 776.

IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1955.

PACIFIC EMPLOYERS INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

HAROLD B. WACKERLE and EVELYN WACKERLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

Respondents submit that the Statement of the Question Presented contained in the Petition is inaccurate. The Court of Appeals did **not** hold, as alleged, that the Automobile Substitution Endorsement was not a "new contract"

between the parties, but rather held that under the Missouri law (a) the Driver Exclusion Endorsement was void for want of consideration; (b) the Automobile Substitution Endorsement by its own terms was upon the **same terms and conditions** as the original policy and, therefore, the Driver Exclusion Endorsement, being void from its inception for want of consideration, was not a valid term and condition of the original policy and could not become a legally effective term and condition of the policy by reason of the execution of the Automobile Substitution Endorsement even if the latter were regarded as a "new contract"; and (c) the additional premium paid for the Automobile Substitution Endorsement was paid for comprehensive and collision coverage on the new automobile and did not constitute consideration for the Driver Exclusion Endorsement. Thus, the only question before this court is: **Did the Court of Appeals err in holding that under the Missouri law the Driver Exclusion Endorsement was void for want of consideration and that neither the Automobile Substitution Endorsement itself, nor the additional premium paid by the insured to the company in connection therewith, supplied a consideration for the Driver Exclusion Endorsement?**

STATEMENT OF THE CASE.

Respondents desire to correct certain inaccuracies in and supply certain omissions from Petitioner's Statement of the Case.

The policy in question was issued for a period of one year from November 15, 1952 for a total premium of $146.16 which was paid by the insured at the time the policy was issued (R. 6). No part of this premium was ever returned to the policyholder (R. 6).

The policy made no reference to any rating scale or classification system the Company might have had, but merely

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stated the amounts of the premiums charged for the various coverages afforded (R. 6). The policy gave the Company no right to raise or charge any additional premium for the coverages afforded by the policy (R. 6). Because the policy contained no reference to any rating scale or classification system and because it gave the Company no right to raise or charge an additional premium under any circumstances, Respondents objected to all of the evidence offered in connection therewith on the grounds that the policy was a written contract and that such evidence would violate the parol evidence rule and would be wholly irrelevant (R. 15, 17).

The policy gave the Company the right to cancel at any time upon five days notice and upon return of the unearned premium (R. 8).

As issued, the policy covered anyone operating the insured automobile with the permission of the Named Insured (R. 7). At the time of the collision with Respondents, the insured automobile was being operated by the Named Insured's son with her permission (R. 2, 3).

The Driver Exclusion Endorsement purported to be effective from and after January 26, 1953, which was during the policy period (R. 8).

The Automobile Substitution Endorsement (copy attached to Record at page 10) was issued under the Newly Acquired Automobile provision contained in the policy (R. 7). It was dated May 22, 1953 and substituted the new automobile for the old one under the policy (R. 10). It contained the following express provision:

> "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions or limitations of the undermentioned Policy other than as above stated" (R. 10).

Statements are made by Petitioner in its Petition that the "Casualty and Surety Rate Regulatory Law" of Missouri "regulates and prescribes" the rates charged in Missouri for casualty insurance (Petition 4, 8). This is highly misleading, for the specific rates are in no sense prescribed or fixed by the State of Missouri, as the regulation goes only to the extent that rates may be neither excessive, inadequate nor unfarily discriminatory.* Within these broad limits, rates are fixed solely by the insurance companies themselves.

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* 1949 R. S. Mo., 379.470: "(1) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory;".

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ARGUMENT.

I.

The Decision Below Is Clearly Correct.

Petitioner alleges that this court should grant certiorari because "the 8th Circuit Court of Appeals failed to follow the Missouri law in this case". Petitioner further alleges that the **Rice** case (discussed infra), upon which the Court of Appeals principally based its decision is not controlling because it is not a decision of the Supreme Court of Missouri.

Although it is true that certiorari will or may be granted if a Court of Appeals decides an important question of state law in conflict with local decisions, no such conflict has been shown in this case.

The precise issue that is now before this court has been carefully considered and decided adversely to Petitioner by the Kansas City Court of Appeals in **Rice v. Provident Life and Accident Insurance Company**, 231 Mo. App. 560, 102 S. W. 2d 147. There the court held squarely that an endorsement reducing the coverage on a health and accident insurance policy that was placed on the policy with the knowledge and consent of the insured was void for want of consideration. Precisely the same arguments that were used in the **Rice** case (and rejected) were used by petitioner in this case and similarly rejected. As an indication of the extent to which the law of Missouri is well settled on this question, the court, in affirming an award for vexatious refusal to pay, said (l. c. 151):

> "The legal question here presented as to the validity of a rider to be attached to the policy in question is one to be determined by the application of principles

> of general law long established, about which there can be no reasonable ground for difference. The general law has long been that there must be a mutual consideration for a contract between two parties."

The **Rice** case is a square holding by the Kansas City Court of Appeals that the endorsement in question is invalid. No Missouri case holds to the contrary and this court has many times ruled that an announcement of state law by an intermediate Appellate State Court must be accepted by Federal Courts in the absence of convincing evidence that the law of the state is otherwise. See, for example, **Six Companies of California v. Joint Highway District No. 13 of State of California**, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114, reh. den., 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475.

Nor is the **Rice** case the only precedent for the lower court's decision. The question of the validity of a similar endorsement was before the 8th Circuit Court in **Mutual Benefit Health and Accident Assn. v. Cohen** (1952), 194 F. 2d 232. There too, the 8th Circuit held the rider involved void for want of consideration. Certiorari was petitioned in the **Cohen** case and denied. 343 U. S. 965, 96 L. Ed. 1362, 72 S. Ct. 1059.

Other Missouri cases that are in accord with the rule of the **Rice** case are **Patterson v. American Insurance Company**, 164 Mo. App. 157, 148 S. W. 448 and **Baker v. Sovereign Camp W. O. W.**, 233 Mo. App. 13, 116 S. W. 2d 513. The **Patterson** case involved a vacancy permit under a fire insurance policy. The court, in holding that testimony of the plaintiff to an alleged oral contract with the company's agent was inadmissible, stated during the course of the opinion that:

> "Parties who make a contract have the power to modify it by a subsequent agreement, but there must

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be a sufficient consideration for the modification to give it contractural force."

Cases in other jurisdictions holding riders to insurance policies void for want of consideration are **Maryland Casualty Company v. First National Bank of Atlanta, Texas** (C. C. A. 5th), 82 F. 2d 465 (robbery policy), and **American Casualty and Life Company v. Mason** (Tex. Civ. App.), 244 S. W. 2d 691 (health and accident policy).

Aside from the foregoing, however, it is clearly apparent that the decision of the lower court was correct. Under the undisputed facts, the policy, when written, provided coverage under the omnibus clause while the automobile was being operated by insured's son with her permission (R. 7). This coverage was a valuable right that had been paid for by the policyholder when she paid the original premium for the policy. By paying the premium she had fully performed her part of the insurance contract, and as to her, the contract was completely executed. As to the insurance company, however, it was wholly executory and would remain so until payment after loss. With this analysis of the situation, what right, during the term of the policy, would the insurance company have to reduce the coverage that it had already demanded and received a premium for, without in some way, either by a return of a portion of the premium or otherwise, compensating the insured for such reduction in coverage? The Driver Exclusion Endorsement itself was obviously of no benefit to her, because it reduced the coverage she had already paid for and gave her nothing. The company returned no part of her premium (R. 17). Nor did the company suffer any legal detriment in not extracting an additional premium from the insured, because the policy gave it no right to any such additional premium. **Rice v. Provident Life and Accident Company** (supra).

Under such circumstances as these, the Missouri courts have consistently held that an agreement by a party to a contract who has fully performed his part of the contract, to modify the still executory promises of the other party, solely to the other party's advantage, is wholly ineffectual unless supported by some additional consideration. In **Stoedter v. Turner et al.** (Mo. App.), 237 S. W. 141, the court said (l. c. 144):

> "There can be no doubt that parties to a contract may lawfully rescind, abrogate, or terminate the same. And where the contract is wholly executory, it may be rescinded or set aside by mutual agreement of the parties; no other consideration being necessary. But a voluntary giving up or surrender of a valuable right accrued under a contract is ineffectual unless supported by a valuable consideration."

To the same effect is **Renner v. Luchow** (Mo. App.), 280 S. W. 77, 78; and see also: **Curry v. Boeckeler Lumber Co.**, 224 Mo. App. 336, 27 S. W. 2d 473; **Wilt v. Hammond**, 179 Mo. App. 406, 165 S. W. 362; **José et al. v. Aufderheide**, 222 Mo. App. 524, 293 S. W. 476; 17 C. J. S. 883, Contracts, Sec. 391, and 12 Am. Jur., Contracts, Sec. 407 et seq. We know of no Missouri cases holding to the contrary.

The cases cited by petitioner announcing the rule as to substituted contracts have no application here for three reasons. First, if the Automobile Substitution Endorsement be regarded as a new contract (because it changed a term of the old, i. e., the automobile covered) it could not have the effect of imparting validity to the prior Driver Exclusion Endorsement because by its own terms it was not intended to have any effect upon the policy except to substitute automobiles. Second, because under Missouri law, as announced in the **Rice** case, the Driver Exclusion Endorsement, to be valid at all, must have been valid at the time of its execution and could not become

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so at some future time. The court, in the **Rice** case, said (l. c. 151):

> "It is true that those who make a contract may unmake it or substitute another, either wholly or partially inconsistent; but the validity of the substituted contract must be determined, like that of any other, in the light of the situation existing at the hour of its making. If valid then, it will supersede or modify the first to the extent that the two will be unable to stand together."

The third reason why the rule as to substituted contracts has no application here is that the rule by its own terms states that "the substitution of a new contract for an old contract while still unperformed is a sufficient consideration for the NEW contract" (from **Avellone** case quoted on page 11 of the Petition). Here the question is not the consideration for the **new** contract (the Automobile Substitution Endorsement) but the alleged **old** contract (the prior Driver Exclusion Endorsement). And see discussion in opinion of lower court on pages 26-29 of Petition.

The remainder of the cases cited by petitioner either state abstract propositions of law about which we have no quarrel or they involve facts and issues entirely dissimilar to those here involved. Petitioner has not pointed to a single Missouri case, much less a Missouri Supreme Court case, that is in conflict with the decision of the lower court. It has thus failed to show the existence of a conflict with the Missouri law as a basis for granting certiorari.

II.

There Is No Conflict Between Circuits.

Supreme Court Rule 19 1 (b) states that one of the considerations governing review on certiorari is "Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Petitioner does not allege the existence of any such conflict, but alleges instead that "The decision is in conflict with the rule pronounced in prior decisions of the Circuit Court of Appeals for the Eighth Circuit" and then cites a rule for decision adopted by the Eighth Circuit to the effect that it will give great weight to the decision of the trial court and will not reverse unless it is convinced that the decision of the trial court was induced by a "clear misconception or misapplication of the law."

We submit that such an alleged "conflict" by a Court of Appeals with its own prior decisions would not be grounds for certiorari. A court of appeals has full power to overrule its own prior decisions and it certainly has full power to refuse to follow a rule of decision adopted by it, or, for that matter, to abolish the rule altogether. But we further submit, that the Eighth Circuit followed the foregoing rule in its decision in this case, because the holding by the trial judge that the payment of an additional premium for the Automobile Substitution Endorsement *by the insured* **to the company** (passing, as it does, to the wrong party) is a sufficient consideration to support the Driver Exclusion Endorsement which reduced the benefits that she had already paid for under the policy, is clearly a "misconception" of law!

The facts in this case were undisputed. The only issue before the lower court was the validity of the Driver Exclusion Endorsement—a pure question of law. The

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Court of Appeals was in as good a position to decide this question of law as the trial judge. They were not bound by his decision. **Flannery Bolt Co. v. Flannery** (CCA 3rd), 86 F. 2d 43, 36 CJS 339, Sec. 297a; **Exmoor Country Club v. United States** (CCA 7th), 119 F. 2d 961; **Bogardus v. Commissioner,** 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32.

III.

There Is No Important Question of Federal Law.

Supreme Court Rule 19, 1 (b) states that one of the considerations governing review on certiorari is "When a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court." Petitioner does not allege the existence of any such question, but asserts instead that "This case is of sufficient importance in the commercial field of liability insurance contract law to elicit certiorari." We submit that upon analysis of the factual situation and the opinion of the lower court, this assertion loses substance.

In the first place, the Court of Appeals did not hold that an insurance company may not use a rider or endorsement to alter the coverage under an automobile liability insurance policy with the consent of the insured and without the repayment of a part of the premium. What the court **did** hold was that a company cannot, during the term of its policy, reduce the coverage that it has afforded in the policy and for which it has been paid in advance, with the naked consent of the insured alone, unsupported by any consideration. This, as we have already shown, is in accordance with the law of the State of Missouri and is a just, fair and reasonable holding.

In the second place, the decision will not in any way hamper the lawful operations of any legitimate insurance

company in a similar situation. If the company does not want to assume the risk of liability for operation of an insured automobile by a particular driver, and it has an agreement with the policyholder to exclude him, when it issues the original policy it can legally exclude him in the policy itself or in an endorsement issued **with** the policy (the endorsement then being considered a part of the original policy) and if the premium is paid for the policy so issued and the policy is accepted by the policyholder, the exclusion will be fully effective. On the other hand, if, after the original policy is written without any such driver exclusion, the company later discovers or decides that it will be exposed to a greater risk of liability by reason of the operation of the insured automobile by a particular driver than the company desires to assume, the company, in its own policy, has provided itself with a completely adequate remedy: it may cancel the policy and return the unearned portion of the premium to the insured. Furthermore, if, after cancellation, the former insured will agree to it and pay for it, the company may issue a new policy containing the driver exclusion provision it desires. Additionally, if the company prefers to handle the matter by rider, as in this case, rather than by cancellation, it can return a part of the original premium to the policyholder as a consideration for its limiting the coverage.

Instead of doing any of these things, however, this company issued its unrestricted policy for a term of one year in consideration of the payment of the premium set by it and then, during the life of the policy, unlawfully attempted by means of the endorsement in question, to modify the original contract to its own advantage by reducing its exposure to liability without at the same time offering any compensation or consideration to the policyholder. This the Missouri law proscribes.

In summary, we submit that the decision of the lower court is sound, logical and clearly correct under the Mis-

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souri law. Petitioner has failed to point to a single case holding to the contrary; it has shown no conflict between circuits; it has shown no important federal question that should be settled. In short, it has failed to show the existence of any ground whatsoever for the granting of certiorari.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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